

II.

UNDER EXISTING FEDERAL LAW

THE COURT IS REQUIRED TO ORDER

THE DEPOSITION AND RELEASE OF THIS WITNESS

18 U.S.C. Section 3144 provides that a material witness who is unable to comply with any condition of release has the right to have their deposition taken and thereafter be released:

"No material witness may be detained because of inability to comply with an condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice..."

"Upon such a showing, the district *must* order [the witness'] deposition and prompt release." (Torres-Ruiz v. United States District Court for the Southern District Court of California, 120 F.3d 933, 935 (9th Cir., 1997)) (emphasis in original).

Further, Federal Rule of Criminal Procedure 15 (a) provides the procedure basis for this motion for deposition:

"If a witness is detained pursuant to Section 3144 of Title 18, United States Code, the Court on written motion of the witness and upon notice to the parties may direct that the witness's deposition be taken. After the deposition has been subscribed the Court may discharge the witness..."

Under such circumstances, "if the deposition would prove admissible over any objection under the Confrontation Clause of the United States Constitution or the Federal Rules of Evidence, the

1 material [witness] must be deposed rather than detained." (Aguilar-
2 Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992)).

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4 The language of 18 U.S.C. Section 3144 is mandatory and
5 requires material witnesses's deposition and release.

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7 Further, legislative history supports the position that the
8 deposition and release of a material witness is mandatory.

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10 Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS,
11 reads (in part):

12 This Section carries forward, with two significant changes,
13 current 18 U.S.C. 3149 which concerns the release of a material
14 witness. If a person's testimony is that it may become
15 impracticable to secure his presence by subpoena, the government is
16 authorized to take such person into custody. A judicial officer is
17 to treat such a person in accordance with Section 3142 and to
18 impose those conditions of release that he finds to be reasonably
19 necessary to assure the presence of the witness as required, or if
20 no conditions of release will assure the appearance of the witness,
21 order his detention as provided in Section 3142. However, if a
22 material witness cannot comply with release conditions or there are
23 no release conditions that will assure his appearance, but he will
24 give a deposition that will adequately preserve his testimony, the
25 judicial officer is required to order the witness's release after
26 the taking of the deposition if this will not result in a failure
27 of justice... 1984 U.S. Code Cong. and Adm. News, p. 3182.
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1 In the instant case, in which the material witness will have
2 been incarcerated 41 days on the hearing date of this motion due
3 solely to his inability to secure bond, continued incarceration
4 violates the clearly stated intent of the Congress and the
5 straightforward rulings by the Court of Appeals (Torres-Ruiz v.
6 United States District Court) that such practices shall not be
7 permitted. Prolonged and continued incarceration clearly meets the
8 test of "exceptional circumstances" as referenced in Torres-Ruiz v.
9 United States District Court. In another case where the material
10 witness had been in custody for three weeks, the Fourth Circuit
11 held that continued incarceration with no prospective surety
12 available to post bond was an exceptional circumstance justifying
13 deposition and release of the material witness. (United States v.
14 Rivera, 859 F.2d, 1204, 1205 (4th Cir. 1988)

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16 The circumstances in this case are similar to Torres-Ruiz and
17 Rivera, as the material witness in this case continues to be held
18 for no purpose other than to be a witness owing solely to his
19 inability to post bond. Because deposition serves as an adequate
20 alternative to his continued incarceration, ERMELINDO OLLUA-NAVA
21 has "an overriding liberty interest in not being detained as a
22 material witness when the deposition serves as an adequate
23 alternative to prolonged detention." (Aguilar-Ayala v. Ruiz, 973
24 F.2d 411, 419-420 (5th Cir. 1992)). Under the standards articulated
25 by the Court of Appeals, prolonged incarceration of ERMELINDO
26 OLLUA-NAVA merely because of his inability to secure bond thus is
27 an exceptional circumstance that mandates his immediate deposition
28

1 and release.

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3 Exceptional circumstances also may be shown by the effect of
4 prolonged incarceration on the family of the material witness.
5 (Torres-Ruiz v. United States District for the Southern District of
6 California) In the Torres-Ruiz case, the material witnesses were
7 held more than 60 days and the Ninth Circuit held "the continued
8 detention of . . . material witnesses, whose testimony could be
9 adequately preserved by videotaped deposition and whose families
10 are suffering extreme hardship as a result of petitioner's
11 continued detention, is an exceptional circumstance justifying the
12 extraordinary remedy of mandamus. . ." and ordered the district
13 court to "schedule video depositions of petitioners at the earliest
14 possible date."

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16 In the instant matter, counsel acting on behalf of the
17 detained material witness believes there will be no failure of
18 justice in requiring a deposition, and asserts that such is
19 supported by case law. It is true that the defendants have a
20 Constitutional right to confront and cross-examine witnesses
21 against them, but these rights must be balanced against the
22 Constitutional rights of the detained witness. In this matter, the
23 defendants are represented by counsel who has been notified of the
24 deposition and invited to ask all questions of the witness which
25 counsel believes will further their case.

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III.

CONCLUSION

Under the clear meaning of 18 U.S.C. Section 3144, legislative history and relevant case law, the ordering of a deposition and subsequent release of this material witness is mandatory. With that in mind, the witness respectfully requests this Court grant a video deposition of his testimony and then order his release.

DATED: May 26, 2008

/s/ Al Smithson
AL SMITHSON, Attorney for
Material Witness
ERMELINDO OLLUA-NAVA